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# **Political Power, a Religious Agenda, and the Failings of the Endorsement Test: Hasidic Educational Separatism and the East Ramapo School Board**

*By Kathleen Lockwood\**

## **I. INTRODUCTION**

While presiding over the last meeting of the East Ramapo School Board before its summer break of 2012, Daniel Schwartz, a member of the Hasidic Jewish community of New Square, New York, and the controversial chairman of the Board, addressed criticism of the Board's alleged financial favoritism of yeshivas<sup>1</sup> at the expense of the public school system.<sup>2</sup> In response to a suggestion that members of the Hasidic Jewish community were unfit to serve on the board because of their preference for private yeshivas over public schools, Schwartz remarked in a now infamous line: "You don't like it? Find yourself another place to live."<sup>3</sup>

Schwartz's comment reflects what many believe to be the underlying rationale of the Board's actions since Rockland County's Hasidic Jewish population gained the majority of the Board seats in 2007—educational separatism for the Hasidic Jewish population at the expense of the surrounding minority populations. Board members are alleged to have attempted de facto separatism in East Ramapo by cutting the funding to public schools in the district so dramatically that non-Hasidic residents feel compelled to move away from the district to provide an appropriate education for their children. These funding cuts are only one part of an alleged larger scheme to funnel money into

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1. "Yeshiva" is a Hebrew word meaning "[A]n elementary or secondary school with a curriculum that includes religion and culture as well as general education." THE AMERICAN HERITAGE DICTIONARY 2070 (3d ed. 1992).

2. See Polanve, *Schwartz Claims Others are Responsible for Rancor in East Ramapo*, YOUTUBE (May 29, 2012), <http://www.youtube.com/watch?v=VFOLVKXevKs#t=24> (discussing anti-Semitic protests in the District).

3. *Id.* at 4:28–4:42.

private Hasidic schools while practically de-funding non-Hasidic public schools.

This Note explores the East Ramapo School Board's Establishment Clause violations through their pursuit of de facto educational separatism. In doing so, this Note dissects the endorsement test's reliance on the secular purpose and effects prongs of *Lemon* test and shows how this analysis fails to address Establishment Clause violations like those in East Ramapo. In response, this Note proposes a revival of the entanglement prong of the *Lemon* test to ensure Establishment Clause jurisprudence that appropriately identifies and addresses violations of politically powerful religious groups. This analysis aims to show both the legitimacy and the flaws of modern Establishment Clause jurisprudence while urging the judiciary to respond to East Ramapo in a way that offers all residents the religious protections guaranteed by the First Amendment.

Analysis proceeds in four parts. Part II provides a factual background on Hasidism and educational separatism. Part III explores the Hasidic population of East Ramapo and their attempt at educational separatism. Part IV explores the applications and insufficiencies of the endorsement test as applied to East Ramapo. Further, Part IV proposes an application of *Lemon*'s entanglement prong to address abuses of political power used to impose religious beliefs.

## II. THE HISTORY OF HASIDIC SEPARATISM AND EDUCATION

### *A. Hasidic Judaism and Separatism*

Hasidic Judaism<sup>4</sup> is a movement within Orthodox Judaism, founded by Rabbi Israel ben Eliezer Ba'al Shem Tov in the mid-1700s.<sup>5</sup>

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4. The word "Hassidism" means "devout piety, service to God and one's fellow human beings beyond the required norm." Morris M. Faierstein & Joel Rosenberg, *Hasidic Masters*, THE JEWISH ALMANAC 24 (Richard Siegel & Carl Rheins eds., 1980). The Hasidic tradition believes that Creation of the world occurred as "God 'withdrew from Himself into Himself' to leave the primordial 'empty space' into which the finite world could eventually emerge." *Hasidism*, in 8 ENCYCLOPAEDIA JUDAICA 393, 408 (Michael Berenbaum & Fred Skolnik eds., Keter House Publ'g Ltd., 2d ed. 2007). Hasidic Jews believe that "redemption [comes] through the acts of prayer, the joy of doing *mitzvahs*, and the study of Torah." Haran C. Rashes, *Try, Try, Try Again: The Kiryas Joel Village School District and the*

The Holocaust destroyed many of the Hasidic centers of Eastern Europe, leading their survivors to immigrate to the United States after World War II, bringing their religious traditions with them.<sup>6</sup>

Joel Teitelbaum was a prominent leader in Hasidism during the early 1900s.<sup>7</sup> Teitelbaum was himself a Holocaust survivor, and led the Satmar sect<sup>8</sup> in its relocation to the United States following the war.<sup>9</sup> These followers originally settled in New York City.<sup>10</sup> Upon their rapid growth and desire for segregation, Teitelbaum and tens of thousands of his followers moved into rural New York State, founding the village of Kiryas Joel in Monroe, New York.<sup>11</sup> The village would later become the battleground for the First Amendment fight over Hasidic educational separatism in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>12</sup>

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*Separation of Shul, School, and State*, 29 U. TOL. L. REV. 485, 488 (1998) (citing 21 YALE STROM, *THE HASIDISM OF BROOKLYN*, at xviii (1993)).

5. JAY MURRAY ROSMAN, *FOUNDER OF HASIDISM: A QUEST FOR THE HISTORICAL BA'AL SHEM TOV* 11 (1996).

6. *Hasidism*, in 8 *ENCYCLOPAEDIA JUDAICA*, *supra* note 4 at 397.

7. *Teitelbaum*, in 19 *ENCYCLOPAEDIA JUDAICA*, *supra* note 4 at 582, 583.

8. Satmar Hasidism is one of the largest Hasidic sects in the world. See Lou Grumet & Justin JaMail, *The Lessons of Kiryas Joel*, 83 N.Y. ST. B.A. J. 10, 12 (May 2011). Within the Hasidic tradition, the Satmar sect is comprised of strict followers of Jewish law. Judith Lynn Failer, *The Draw and Drawbacks of Religious Exclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel*, 72 IND. L. J. 383, 387 (1997). According to scholars: "The 'very fulcrum of [the Satmars'] daily existence' is the obligation to strictly follow all six-hundred-and-thirteen *mitzvahs* [or commandments] set forth in the Torah." See Rashes, *supra* note 4, at 489 (quoting Harvey Arden, *The Pious Ones*, 148 NAT'L GEOGRAPHIC 276, 284 (1975)). According to an academic observer, many Satmars "have found that the only way to follow their religion is through partial isolation." *Id.*

9. Rashes, *supra* note 8; see also Grumet & JaMail, *supra* note 8, at 12.

10. It is said of Hungarian Hasidism, that upon coming to the United States after World War II, they "exhibited no interest in winning over other Jews and remained self-segregated . . . . Most Hungarian Hasidim concentrated in a few neighborhoods of New York City, shunned the daily press and the mass media, and rejected secular education with grudging acceptance of the state's minimum standards." *Hasidism*, in 8 *ENCYCLOPAEDIA JUDAICA*, *supra* note 4, at 397.

11. *Teitelbaum*, in 19 *ENCYCLOPAEDIA JUDAICA*, *supra* note 4, at 583.

12. 512 U.S. 687 (1994); see also *infra* notes 32–55 and accompanying text.

Teitelbaum was a fierce advocate for Jewish separatism.<sup>13</sup> He was known to quote an older rabbi, saying, "Separatism [is] of such importance that even if a city had no wicked Jews, it would be worthwhile to pay some wicked Jews to come and live there so that the good Jews would have something to separate themselves from."<sup>14</sup> As evidence of his belief in strict tradition and separatism, Teitelbaum reportedly believed that the Holocaust was God's punishment of the Jewish people for Israel's secularism and departure from tradition.<sup>15</sup>

Within the Orthodox tradition, Hasidic Jews are known for their stringent aversion to "contaminating the community" and strict observance of Jewish law.<sup>16</sup> Due to their scrupulous adherence to Jewish law, they are recognized for their traditionalism and self-imposed isolation: "[E]ven though Jewish law does not require Jews to live apart from non-Jews or to eschew modern conveniences, many Hasidic Jews assume the responsibilities of these additional requirements in order to ensure that they are living as holy a life as they can."<sup>17</sup>

Within the context of education, this traditionalism and separatism manifests itself in yeshivas. A yeshiva is a "school in which the Talmud, Jewish legal codes, and rabbinic literature and commentaries are the primary subjects of study."<sup>18</sup> Modern yeshivas in the United States are religious private schools that provide some secular studies<sup>19</sup> but still focus primarily on the religious study of the texts, history, and traditions of the Hasidic Jewish faith.<sup>20</sup> Many Hasidic Jews "want their school(s) to serve primarily as the bastion against undesirable

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13. Benjamin Wallace-Wells, *Them and Them*, N.Y. MAGAZINE (Apr. 21, 2013), available at <http://nymag.com/news/features/east-ramapo-hasidim-2013-4/>.

14. *Id.*

15. Teitelbaum, in 19 ENCYCLOPAEDIA JUDAICA, *supra* note 4, at 583.

16. See Failer, *supra* note 8, at 387.

17. See Failer, *supra* note 8, at 387.

18. Samuel C. Heilman, *Yeshiva*, in 4 ENCYCLOPEDIA OF THE MODERN MIDDLE EAST AND NORTH AFRICA 2399 (Philip Mattar ed., New York: Macmillan Reference USA, 2d ed. 2004).

19. There are some controversies (past and upcoming) about yeshivas being so devoted to Orthodox teachings that they refuse to teach the basic subjects required by New York State Education law. See Sonja Sharp, *English is Absent and Math Doesn't Count at Brooklyn's Biggest Yeshivas*, DNA INFO (Jan. 22, 2013, 6:43 AM), <http://www.dnainfo.com/new-york/20130122/crown-heights/english-is-absent-math-doesnt-count-at-brooklyns-biggest-yeshivas>.

20. *Id.*

acculturation, as a training ground for Torah knowledge in the case of boys, and in the case of girls, as a place to gather knowledge they will need as adult women.”<sup>21</sup> Much of the curriculum is taught in Yiddish, and it has been widely suggested that the yeshivas only include English in limited studies so as to satisfy New York education law mandates.<sup>22</sup> Students in yeshivas dress in traditional garb, including the traditional black coats, black hats, and earlocks known as “peyot.”<sup>23</sup> Children are separated by sex for instruction, and curricula differ for men and women based on the faith’s religious beliefs regarding the strengths and roles of each sex in society.<sup>24</sup> Many Hasidic parents and children are content with the education and training offered by yeshivas. However, in the case of parents with special needs children, the community has been faced with deciding how and where these children’s needs can be met in a separatist community.

#### *B. Hasidism and Federal Special Education Law*

Hasidic populations face a somewhat unique problem with regard to the special education needs of their children. For generations, the custom within these communities was to hide a disabled child’s impairments from the community, even if it meant hiding the child.<sup>25</sup> The social structure of these segregated Satmar communities place much stock in a child’s marriage prospects, and the reputation of an entire family could be damaged by the perceived handicap of one family member.<sup>26</sup> However, in the 1980s, a cultural shift occurred within Hasidic communities. Harriet Feldman, an Orthodox Jewish leader and mental health pioneer in her community, founded the first special education school in Spring Valley, New York, that educated severely

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21. ISRAEL RUBIN, SATMAR: AN ISLAND IN THE CITY 140 (1972).

22. See Rashes, *supra* note 4, at 490 (“Satmar ‘children learn Yiddish as their native tongue’ and only learn English in their parochial schools because it is mandated by the State of New York.”); Harvey Arden, *The Pious Ones*, 148 NAT’L GEOGRAPHIC 276, 284, 294 (1975); RUBIN *supra* note 21, at 139.

23. See Rashes, *supra* note 4, at 489; 15 THE ENCYCLOPEDIA OF HASIDISM 379 (Tzvi M. Rabinowicz ed., 1996).

24. See Rashes, *supra* note 4, at 491.

25. See Wallace-Wells, *supra* note 13 (see link for page 5 in original hyperlink).

26. *Id.*

disabled students in a Jewish environment.<sup>27</sup> As the cultural shift in the perception of special education progressed, the demand for special education services in yeshivas outgrew available resources.<sup>28</sup> By 1988, in a case centered on the special education needs of Hasidic children, a New York court noted that “[n]on-public schools, with smaller enrollments and more limited facilities and fiscal resources, have generally been unable to provide such specialized offerings, which frequently require small classes, special equipment, and highly specialized staffing.”<sup>29</sup>

In such situations, the Hasidic communities turned to the protection of federal education law, specifically the Individuals with Disabilities Education Act (“IDEA”).<sup>30</sup> The IDEA requires states that receive federal funds for education to provide all children with a free appropriate public education that is “reasonably calculated to enable the child to receive educational benefits.”<sup>31</sup> This means that, even if a student would otherwise be enrolled in a private school, the state education system is obliged to provide for the special education needs of the child through public school services or tuition reimbursement for private school services.<sup>32</sup>

The tuition reimbursement mechanism of the IDEA mandates that if a public school is not able to provide a free, appropriate education that meets the special education needs of a student, the school district must reimburse the student for any out-of-district or private placement that is made in order to meet these educational needs.<sup>33</sup> Hasidic

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27. *Id.*

28. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 772–73 (1988).

29. *Id.*

30. 20 U.S.C. § 1412(a)(1)(A).

31. Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 (2d. Cir. 1998); *see also*, 20 U.S.C. § 1412(a)(1)(A); ADVOCATES FOR CHILDREN OF NEW YORK, SPECIAL EDUCATION 17 (2013), *available at* [http://www.advocatesforchildren.org/sites/default/files/library/guide\\_to\\_special\\_ed.pdf?pt=1](http://www.advocatesforchildren.org/sites/default/files/library/guide_to_special_ed.pdf?pt=1).

32. *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009) (holding that the state is responsible for tuition reimbursement of a special needs child even if the child never attended public school).

33. *See* Michael J. Tentindo, *Private School Tuition at the Public's Expense: A Disabled Student's Right to a Free Appropriate Public Education*, 17 AM. U. J. GENDER SOC. POL'Y & L. 81, 85 (2009). Tentindo writes:

populations have utilized both the public school system and the reimbursement mechanism of the IDEA to attempt to address the special education needs of their children.

The Hasidic community of Monsey, New York, faced the challenges of educational separatism and special education through the public case of *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>34</sup> Initially, this religious community met the special education needs of its children by employing a public instructor to provide special education services in an annex to one of the village's yeshivas.<sup>35</sup> However, following the Supreme Court's ruling in *Aguilar v. Felton*<sup>36</sup> in 1985, the public school district refused to provide public instructors for special needs children in yeshivas. Children from the Kiryas Joel village who needed special education services were then forced to attend public schools outside of the village.<sup>37</sup>

These public schools proved to be a bad fit for followers of Hasidic Judaism in Monsey, with parents of special needs Hasidic children in public schools reporting that their children felt "the panic, fear and trauma . . . in leaving their own community and being with

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Under the IDEA, if a FAPE is not provided, courts have the power to grant appropriate relief, including tuition reimbursements to the parents of a disabled child who previously obtained special education and related services from or under the authority of a public agency. Thus, if parents send their disabled child from a public school to a private school, both the IDEA and judicial precedent recognize their parental right to obtain a tuition reimbursement if (1) the school board fails to offer an appropriate IEP; (2) the child's private school placement was proper under the IDEA's requirements; and, (3) equitable considerations support granting relief. *Id.*

34. 512 U.S. 687 (1994).

35. *Id.*

36. 473 U.S. 402 (1985). The Court in *Aguilar* invalidated Title I of the New York State's Elementary and Secondary School Act of 1965, which provided publicly funded instructors for special education remedial classes at parochial schools in low-income areas. The Court held that Title I violated the Establishment Clause because it led to an entanglement between the State and religious schools. *Id.* at 409-414.

37. *Kiryas Joel*, 512 U.S. at 692.



people who were so different.”<sup>38</sup> These parents went before the New York state courts to petition that public schools implement religious accommodations for Hasidic special education students receiving services in public schools.<sup>39</sup> The parents asserted that “compelling the children to attend regular public school classes and programs forces them to choose between following the precepts of their religion and foregoing the benefits on the one hand, and accepting the benefits while violating their religious beliefs on the other hand.”<sup>40</sup> However, the court found that these parents had not met their burden of proof for such an assertion because the specific harm to their children that they alleged was an emotional impact—feelings of isolation and trauma—rather than the threatening of a sincere religious belief.<sup>41</sup>

The court’s trivialization of the parents’ concerns proved misguided, as reflected in the fact that “[b]y 1989, only one child from Kiryas Joel was attending Monroe-Woodbury’s public schools; the village’s other handicapped children received privately funded special services or went without.”<sup>42</sup> This fact seems to validate the parents’ claim that parents and children were forced to follow their religion or go without special education services.<sup>43</sup>

In response to the special education service gap in the village,<sup>44</sup> the New York legislature passed a statute “which provided that the

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38. *Id.* (citing Bd. of Ed. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (1988)).

39. *See* Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767 (1988).

40. *Id.* at 775.

41. *Id.* The Court has consistently emphasized that for a claim for exemption to be successful on the basis of the Free Exercise Clause, it must rest on the basis of religious belief. The landmark case in this regard is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Court held that the Amish were exempt from a Wisconsin law requiring school attendance because the Amish’s refusal to send their children to school past eight grade was “one of deep religious conviction, shared by an organized group and intimately related to daily living.” *Id.* at 216.

42. *Kiryas Joel*, 512 U.S. at 693.

43. Such a choice is analogous to the choice to get unemployment benefits or abandon the religious practice of observing a Saturday Sabbath, which was found to violate the Free Expression Clause in *Sherbert v. Verner*, 374 U.S. 398 (1963).

44. *Kiryas Joel*, 512 U.S. at 693. (“In signing the bill into law, Governor Cuomo recognized that the residents of the district were ‘all members of the same religious sect,’ but said that the bill was ‘a good faith effort to solve th[e] unique

village of Kiryas Joel 'is constituted a separate school district, . . . and shall have and enjoy all the powers and duties of a union free school district.'"<sup>45</sup> This made Kiryas Joel village, the entirety of which was made up of members of the Satmar sect of Hasidim, into its own school district, thereby allowing the village to create its own school board with plenary power over all public schools in the village.<sup>46</sup> Because the new school district's residents were all Satmars with children in yeshivas, the school board of this district only ran one public school—a special education program for handicapped children from the village.<sup>47</sup> This program allowed Satmar children with special education needs to receive special education instruction within their village, avoiding the religious isolation that previously accompanied attending special education programs outside of the village.<sup>48</sup>

However, before the Kiryas Joel School District began operations, multiple parties, including the New York State School Boards Association, filed suit against the State Education Department, challenging the validity of the law establishing Kiryas Joel School District under the Establishment Clause.<sup>49</sup> The law was held unconstitutional at the state and appellate levels.<sup>50</sup> Upon hearing a challenge to this designation under the First Amendment, the Supreme Court held that New York State had violated the Establishment Clause

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problem' associated with providing special education services to handicapped children in the village.").

45. *Id.* (quoting 1989 N.Y. Laws, ch. 748).

46. *Id.*

47. *Id.* at 694.

48. *Id.*

49. *Id.*

50. *Id.* at 694–95. The trial court held that the law violated all three prongs of the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), such that the law: (1) did not have a secular legislative purpose; (2) had the effect of advancing or inhibiting religion; and (3) resulted in excessive government entanglement with religion. *Kiryas Joel*, 512 U.S. at 695. The Appellate Division affirmed the trial court's ruling, holding that because "both the district's public-school population and its school board would be exclusively Hasidic, the statute created a 'symbolic union of church and state' that was 'likely to be perceived by the [Satmar] Hasidism as an endorsement of their religious choices, or by nonadherents as a disapproval' of their own." *Id.* (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist v. Grumet*, 618 N.E.2d 94, 100 (1993)).

by passing a law that drew school district lines based on religion.<sup>51</sup> The Court held the law to be in conflict with the neutrality principle, which requires government to remain neutral towards religion, not favoring one religion over another religion or secularism.<sup>52</sup> The Court found a violation of this principle, holding that the law “is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires government impartiality toward religion.”<sup>53</sup> Justice Souter briefly addressed the State’s interest in meeting the special education needs of the village,<sup>54</sup> but found the explicit intent to draw the school district lines around the Satmar population dispositive: “Where ‘fusion’ is an issue, the difference lies in the distinction between a government’s purposeful delegation on the basis of religion and a delegation on principles neutral to religion.”<sup>55</sup>

With this decision, the Court sent a clear message to Hassidic populations—the Establishment Clause does not tolerate *de jure* educational separatism on the basis of religion. While this decision may have been a setback for the community of Monsey, it did not stifle future attempts at educational separatism.

### III. EAST RAMAPO SCHOOL BOARD’S ATTEMPT AT EDUCATIONAL SEPARATISM

#### *A. The Setting of De Facto Separatism in East Ramapo*

While the Hasidic population of Monsey adjusted to the dismantling of its *de jure* educational separatism in *Grumet*, the nearby Hasidic population of New Square, New York, steadily grew in size and local influence.

The village of New Square was originally founded in Rockland County, New York, by the Rabbi Jacob Joseph Twesky of the Skvir sect

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51. *Id.* at 690.

52. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1193 (3d ed. 2006).

53. *Kiryas Joel*, 512 U.S. at 690.

54. *Id.* at 702 (“Not even the special needs of the children in this community can explain the legislature’s unusual Act, for the State could have responded to the concerns of the Satmar parents without implicating the Establishment Clause.”).

55. *Id.* at 699.

of Hasidism.<sup>56</sup> A 1984 study on the political influence of the Hasidic population in this area indicated that their political influence did not yet dominate the co-existent secular population of the area, but instead remarked, “there is a potential for future conflict and influence due to changing demographics and growing political ‘resources.’”<sup>57</sup> By 2007, the Hasidic population had gained firm political power in the region by gaining a majority on the school board for the East Ramapo Central School District.<sup>58</sup> The Board governs both the public schools in Spring Valley and the private yeshivas in New Square.<sup>59</sup> There are reportedly 9,000 public school children and 20,000 private school children in yeshivas in East Ramapo.<sup>60</sup>

According to a census released in June 2013, Spring Valley, New York, has a racially diverse population of over 32,000 residents.<sup>61</sup> Of these residents, nearly one-third are under age eighteen<sup>62</sup>—the population of students governed by the actions of the East Ramapo School Board. Twenty-eight percent of the population identifies as white,<sup>63</sup> nearly 37% identifies as Black or African American,<sup>64</sup> 30% identifies as Hispanic or Latino.<sup>65</sup> The number of foreign-born residents is nearly half of the population,<sup>66</sup> with 86% of this population hailing

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56. *Mystics in the Suburbs*, 77 TIME 58, available at EBSCO No. 54203934 (Mar. 3, 1961). The intended name of the town was New Skvir, to reflect its connection to the Skvir sect, but “a typist’s error Americanized it to New Square.” *Id.*

57. Daniel D. Alexander, Abstract, *Political Influence of the Resident Hasidic Community on the East Ramapo Central School District*, UMI DISSERTATIONS PUBLISHING (1982).

58. Wallace-Wells, *supra* note 13 (see link for page 2 in original hyperlink).

59. *Id.*

60. See Jim Fitzgerald, *Barbs of Racism, Anti-Semitism in NY School Clash*, THE ASSOCIATED PRESS (Mar. 21, 2013, 2:59 PM), <http://bigstory.ap.org/article/barbs-racism-anti-semitism-ny-school-clash>.

61. *Spring Valley, New York*, U.S. CENSUS BUREAU, (last updated June 27, 2013), <http://quickfacts.census.gov/qfd/states/36/3670420.html> (showing the population of Spring Valley, New York as 32,082).

62. *Id.* (showing the percentage of residents under age 18 as 31.3%).

63. This percentage reflects the number of residents who identified as white alone (not Hispanic or Latino). *Id.* (showing 28.2% residents identifying as white alone, not Hispanic or Latino).

64. *Id.* (showing 36.8% identifying as Black or African American alone).

65. *Id.* (showing 30.6% identifying as Hispanic or Latino).

66. *Id.* (showing 48.5% of the population identifying as foreign-born).

from Latin America.<sup>67</sup> Nearly 70% of the population reports that a language other than English is spoken in the home,<sup>68</sup> and 42.1% of that segment of people report speaking English “less than very well.”<sup>69</sup> Over 20% of the population is reported to be living below the poverty level,<sup>70</sup> and the per capita money income during the past year is reported at barely below 18,000 dollars.<sup>71</sup> This population is also religiously diverse, with a local survey reporting religious establishments in a variety of Protestant, Catholic, and Islamic sects.<sup>72</sup>

Despite the high concentration of immigrant and minority populations that are not part of the Hasidic faith, the Hasidic Jewish population appears to have taken control of the school board through sheer numbers.<sup>73</sup> According to demographers, Hasidic families have an average of 7.8 children.<sup>74</sup> Further, according to studies of areas with high concentrations of Hasidic Jews, “the votes in Hasidic villages are often 1,000 to one . . . not because the votes were coerced or ordered by rabbis but because the community has a common interest and understands that this interest can be secured by voting together.”<sup>75</sup> Thus, it appears that

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67. *Selected Social Characteristics: Spring Valley, New York*, U.S. CENSUS BUREAU, (last viewed Feb. 26, 2014), <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (showing 81.9% of the population reporting Latin America as their world region of birth of foreign birth).

68. *Id.* (showing 69.9% of the population speaking a language other than English in the home).

69. *Selected Social Characteristics: Spring Valley, New York*, U.S. CENSUS BUREAU, (last viewed Feb. 26, 2014), <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

70. *Spring Valley, New York*, UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3670420.html> (last updated June 27, 2013) (showing 21.1% of the population below the poverty line).

71. *Id.* (showing a per capita income of \$17,803).

72. *See Churches and Other Houses of Worship in Rockland County, NY, Past and Present*, GENEALOGY SOCIETY OF ROCKLAND COUNTY, <http://rocklandgenealogy.org/rcchurches.htm> (last visited Nov. 17, 2013).

73. Wallace-Wells, *supra* note 13 (see link for page 3 in original hyperlink).

74. *Id.*

75. *Id.* at 6; see also Rev. Dr. Weldon McWilliams IV, *East Ramapo Board a Symptom of Community's Segregation*, THE JOURNAL NEWS (Jan. 10, 2014), <http://www.lohud.com/article/20140111/OPINION/301110006/East-Ramapo-board-symptom-community-s-segregation> (“The Hasidic community has skillfully been able to organize itself as a powerful voting bloc in Ramapo, and this has afforded them unprecedented levels of political influence.”).

the Hasidic Jewish population in East Ramapo recognizes voting and the political process as an opportunity to secure power and presumably support their common religious goals.

*B. The Use of Political Power to Achieve Educational Separatism*

Upon taking control of the Board, the Hasidic Jewish school board members almost immediately cut funding to local public schools.<sup>76</sup> A 2013 article in *New York Magazine* describes the Hasid-dominated Board's actions in the first few years: "The new majority on the board cut taxes and budgets, angering the public-school community."<sup>77</sup> The article goes on to describe cuts to school administrative budgets, security staff, extracurricular activity budgets for clubs and sports, faculty and staff salaries and entire positions, and Advanced Placement and English as a Second Language classes.<sup>78</sup> What necessitated these across-the-board cuts? According to a lawsuit filed by taxpayers, public school students, and parents in the East Ramapo Central School District, the money previously spent in these areas was instead funneled into New Square yeshivas through a variety of schemes.<sup>79</sup>

One such alleged scheme involved the use of the reimbursement systems under the IDEA. According to the plaintiffs in *Montesa et al. v. Schwartz*, the Board had an agreement with parents of children in yeshivas through which the parents could "simply write a letter stating they do not accept CSE<sup>80</sup> placement in a public school and request a specific placement with knowledge that it will be granted without any

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76. Wallace-Wells, *supra* note 13 (see link for page 2 in original hyperlink).

77. *Id.*

78. *Id.*

79. Among the various schemes alleged by the plaintiffs are a scheme to control Title I funds such that they benefit only yeshivas, a scheme to use taxpayer money to pay for religious textbooks at yeshivas while refusing to fully fund textbooks in public schools, closure and sale of public school buildings to Hasidic Jewish organizations at a cost well below actual market value, and failure to collect rent from yeshivas that are renting public school property. *See Verified Class Action Complaint, Montesa v. Schwartz*, No. 12cv6057 (CS) (filed Aug. 2, 2012) [hereinafter the Complaint].

80. "CSE" refers to "Committee on Special Education." *See generally* NY EDUC. LAW § 4402 (Consol. 2014) (outlining the general requirements and functions of a Committee on Special Education).

question,”<sup>81</sup> bypassing the typical procedure for private school tuition reimbursement. Upon receiving these letters, the Board would then pass settlements rather than conducting an Impartial Hearing on the qualification for reimbursement as required by the IDEA and New York state law.<sup>82</sup> These settlements would grant the requestor tuition costs<sup>83</sup> and attorney’s fees,<sup>84</sup> presumably to pay for attorney assistance in drafting the request. Because this settlement process nets no tangible documentation of need, the Board was then unable to successfully apply for reimbursement of the settlements from the New York State Education Department.<sup>85</sup> According to the plaintiffs’ complaint, during the 2010–11 and 2011–12 school years, the District spent millions of taxpayer dollars on tuition reimbursement that was never refunded by the state of New York<sup>86</sup> because of “a continued lack of adequate documentation.”<sup>87</sup>

The facts alleged in *Montesa* show de facto segregation of the Hasidic and non-Hasidic population at the hands of the East Ramapo School Board. This de facto attempt is best explained as an application of

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81. Complaint at 67, ¶ 63.

82. *Id.* at 67–68, ¶ 63.

83. The complaint alleges, as an example, that at one Board meeting on July 2, 2009, the board authorized a payment of \$2,301,784.66 to Kiryas Joel, a public school in Monsey and outside of the East Ramapo Central School District, for East Ramapo special education students sent out of District. *Id.* at 70, ¶ 69.

84. *Id.* at 68, ¶ 63.

85. *Id.* at 68, ¶ 64.

86. *Id.* at 70–71, ¶ 69.

87. *Id.* at 76, ¶ 91. With regard to specifics, the complaint further alleges:

For the 2010–11 school year, the District placed seventy-seven (77) students with disabilities in private schools. Fifty-four (54) of these applications were submitted for State reimbursement and only 10% were approved. Thirty-eight (38) did not contain the required documentation, and six (6) were denied due to lack of justification for the approved private school placement. For the 2011–12 school year, the District placed seventy-three (73) students with disabilities in private schools. Fifty (50) of these applications were submitted for State reimbursement; thirty-one (31) were approved and nineteen (19) denied, again due to lack of justification for the approved private school placement. *Id.* at 76–77, ¶ 94–95.

the Curley Effect,<sup>88</sup> a political strategy named after a notorious Boston mayor who attempted to raise the status of Irish immigrants by reducing the wealth of Bostonians of English decent.<sup>89</sup> The Curley Effect is best described as a strategy, “in which inefficient redistributive policies are sought not by interest groups protecting their rents, but by incumbent politicians trying to shape the electorate through emigration of their opponents or reinforcement of class identities.”<sup>90</sup> The New York Magazine article about the East Ramapo School Board referenced above connects the Curley Effect to the actions of the Board:

Some of the public-school parents have come to see the situation in East Ramapo through a lens similar to [the Curley Effect]. When the new majority arrived, says former board member Mimi Calhoun, “they stopped seeing the schools just as a burden and started seeing them as a resource to plunder.”<sup>91</sup>

In January 2013, two non-Hasidic members of the Board resigned, citing decisions being made without their input and an environment of intimidation and harassment.<sup>92</sup> In April 2013, the notorious Board chairman Daniel Schwartz resigned, citing personal and business obligations.<sup>93</sup> An election to fill these seats took place in May

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88. See Wallace-Wells, *supra* note 13 (see link for page 2 in original hyperlink).

89. See Edward L. Glaeser & Andrei Shleifer, *The Curley Effect* (National Bureau of Economic Research, Working Paper 8942, 2002), available at [http://www.nber.org/papers/w8942.pdf?new\\_window=1](http://www.nber.org/papers/w8942.pdf?new_window=1).

90. *Id.*

91. Wallace-Wells, *supra* note 13 (see link for page 2 in original hyperlink).

92. See Letter from Stephen G. Price, Member, East Ramapo Bd. of Educ., to Cathy Russell, Dist. Clerk, East Ramapo Bd. of Educ. (Jan. 21, 2013), available at <http://www.documentcloud.org/documents/561598-stephen-price-resignation-letter-01-21-2013.html>; Letter from Suzanne Young-Mercer, Member, East Ramapo Bd. of Educ., to Cathy Russell, Dist. Clerk, East Ramapo Bd. of Educ. (Jan. 21, 2013), available at <http://www.documentcloud.org/documents/561601-suzanne-young-mercier-resignation-letter-01-16-2013.html>.

93. See Mareesa Nicosia, *East Ramapo Board Chief Schwartz Resigns*, THE JOURNAL NEWS (Apr. 19, 2013), <http://www.lohud.com/article/20130419/NEWS03/304190075/>.



2013.<sup>94</sup> The three winners of the election<sup>95</sup> were supported by the Hasidic community,<sup>96</sup> and were voted in after the Hasidic community outvoted the non-Hasidic community by nearly 2,000 votes.<sup>97</sup>

The future of the East Ramapo School District is still uncertain. As of this writing, *Montesa* is still pending in federal court in White Plains, New York.<sup>98</sup> In November 2013, New York Governor Anthony Cuomo signed a bill that granted East Ramapo \$3.5 million in emergency aid from lottery funds in an attempt to salvage the programs cut from the public schools.<sup>99</sup> A month before this funding was secured, the School District announced that it had plans to restore the state-mandated arts and music programs by incorporating them into social studies classes.<sup>100</sup> However, the make-up of the Board is still majority Hasidic and backed by the Hasidic community, and their political power remains strong.

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94. *East Ramapo, NY—School Board Election Results*, JEWISH POLITICAL NEWS AND UPDATES, <http://jpupdates.com/2013/05/21/east-ramapo-ny-school-board-election-results> (last updated May 21, 2013, 10:43 PM).

95. The winners of the election were Bernard Charles, Maraluz Corado, and Pierre Germain. *Id.*

96. See Mareesa Nicosia, *East Ramapo: 2 Slates Seek 3 Board Seats in Election*, THE JOURNAL NEWS (May 18, 2013), <http://www.lohud.com/article/20130518/NEWS03/305180104>.

97. *East Ramapo, NY—School Board Election Results*, JEWISH POLITICAL NEWS AND UPDATES, <http://jpupdates.com/2013/05/21/east-ramapo-ny-school-board-election-results> (last updated May 21, 2013, 10:43 PM) (reporting a Jewish Community turnout of about 6,500-7,000 voters as compared to a non-Jewish turnout of 4,500-5,000 voters).

98. See *Judge Allows Lawsuit Against East Ramapo School District to Move Forward*, NEWS 12 HUDSON VALLEY (Sept. 30, 2013), <http://hudsonvalley.news12.com/news/judge-allows-lawsuit-against-east-ramapo-school-district-to-move-forward-1.6170331> (video format of report available on page).

99. See Robin Traum, *East Ramapo “Spin Up” Legislation Signed*, NANUET PATCH (Nov. 14, 2013), <http://nanuet.patch.com/groups/politics-and-elections/p/east-ramapo-spin-up-legislation-signed>.

100. See *Art, Music Could Be Coming Back to Cash-Strapped East Ramapo Elementary Schools*, CBS N.Y. (last updated Oct. 25, 2013), <http://newyork.cbslocal.com/2013/10/25/art-music-could-be-coming-back-to-cash-strapped-east-ramapo-elementary-schools> (video format of report available on page).

## IV. FORMULATING AN ESTABLISHMENT CLAUSE THEORY FOR EAST RAMAPO

The role of the Establishment Clause in helping the residents of East Ramapo is not obvious. In his dissent to *Kiryas Joel*, Justice Scalia notes with due hesitation any application of the Establishment Clause simply on the basis of a group of religious people being invested with political power.<sup>101</sup> Further, while Justice Burger in *Lemon* makes the strong and enduring statement that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect,”<sup>102</sup> subsequent case law and scholarship has found that this rationale for forbidding, curtailing, or remedying politically and religiously divisive state action “seems to have served primarily as a rhetorical device or as a concluding flourish to the application of one or another doctrinal test.”<sup>103</sup> In other words, political division along religious lines has not been used as a factor in determining whether improper religious entanglement exists.

The doctrinal test most common to Establishment Clause jurisprudence<sup>104</sup> is the *Lemon* test.<sup>105</sup> While the *Lemon* test is frequently used in Establishment Clause jurisprudence, its application can be

101. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 736 (Scalia, J., dissenting) (“Justice Souter’s position boils down to the quite novel proposition that any group of citizens . . . can be invested with political power, but not if they all belong to the same religion. Of course such *disfavoring* of religion is positively antagonistic to the purposes of the Religion Clauses, and we have rejected it before.”).

102. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

103. Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1669–70 (2006).

104. See Mark DeForrest, *The Use and Scope of Extrinsic Evidence in Evaluating Establishment Clause Cases in Light of the Lemon Test’s Secular Purpose Requirement*, 20 REGENT U. L. REV. 201, 212 (“In most cases, the Supreme Court and the lower federal courts apply a test first fully enunciated in *Lemon v. Kurtzman*.”). Cf. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (describing the *Lemon* test as “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, [it] stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys”).

105. See *Lemon*, 403 U.S. at 612–13.

sporadic and uncertain.<sup>106</sup> Yet, it provides the basic framework of an Establishment Clause analysis, even when it is not explicitly employed.<sup>107</sup> This test holds that a state action must meet the following standards in order to not violate the Establishment Clause: (1) it has a secular purpose; (2) it has neither the principle nor primary effect of enhancing or inhibiting religion; and (3) the state does not foster an excessive government entanglement with religion through this action.<sup>108</sup>

In *Lynch v. Donnelly*,<sup>109</sup> Justice O'Connor's concurrence focused on only the first two prongs of the *Lemon* test to find that government action is unconstitutional under the Establishment Clause if it endorses religion.<sup>110</sup> This test has lived on in subsequent jurisprudence and is known as the "endorsement test."<sup>111</sup> To pass this test, it must be shown that the government's action (1) has a subjectively secular purpose, and (2) that its primary effect does not objectively enhance or inhibit religion.<sup>112</sup>

Courts will usually defer to the government's stated secular purpose,<sup>113</sup> and will often find state action constitutional even if it is motivated by both secular and religious purposes.<sup>114</sup> Because secular purpose is often difficult to disprove,<sup>115</sup> it is this prong of the *Lemon* test that will be the most trouble in proving an Establishment Clause violation in East Ramapo. Further, the court's focus on this prong through the endorsement test makes a failure to disprove secular purpose

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106. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 1202 (3d ed. 2006).

107. *Id.*

108. *See Lemon*, 403 U.S. at 612–13.

109. 465 U.S. 668 (1984).

110. *Id.* at 690.

111. *See THE FIRST AMENDMENT* 692 (Geoffrey R. Stone et al. eds., 2012).

112. *See Lynch*, 465 U.S. at 690.

113. *See Lemon*, 403 U.S. at 613 (“[N]othing . . . undermines the stated legislative intent; it must therefore be accorded appropriate deference.”).

114. *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (holding that “a statute that is motivated in part by a religious purpose may satisfy [the secular purpose prong of *Lemon*]”).

115. *See* Susanna Dokupil, “*Thou Shalt Not Bear False Witness*”: “*Sham*” Secular Purposes in the Ten Commandment Displays, 28 HARV. J.L. & PUB. POL’Y 609, 627 (2005) (“Finding secular purpose typically presents a low bar. . . . If a secular purpose predominates, the odds of a court finding it constitutional will improve.”).

fatal to an Establishment Clause case against the East Ramapo School Board.

*A. The Endorsement Test's Limitations as Applied to East Ramapo*

Even before *Lemon*, the Court recognized the importance of ruling out a secular purpose in Establishment Clause cases. In *McGowan v. Maryland*,<sup>116</sup> the Court held that the Maryland law at issue would be held to violate the First Amendment only “if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State’s coercive power to aid religion.”<sup>117</sup> Since *Lemon*, this test has been rephrased to hold that a state action is constitutional if it has a secular legislative purpose.<sup>118</sup> In her *Lynch* concurrence, Justice O’Connor phrased the secular purpose prong test as an inquiry into “whether the government intends to convey a message of endorsement or disapproval of religion.”<sup>119</sup> The subjective intent requirement of O’Connor’s test makes it difficult to prove a non-secular intent without explicit evidence of religious purpose.

This difficulty is demonstrated by the Court’s ruling in *Harris v. McRae*.<sup>120</sup> In *Harris*, the plaintiffs relied on comparisons between legislative intent and the tenets of the Roman Catholic Church to prove religious motivation in the passage of a federal law limiting Medicaid reimbursement for abortions.<sup>121</sup> The Court was clear in holding that a coincidence of religious belief and legislative motivation was not enough to prove non-secular intent.<sup>122</sup> Following this precedent, it will likely be difficult for the plaintiffs in *Montesa* to disprove secular purpose and

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116. 366 U.S. 420 (1961).

117. *Id.*, 366 U.S. at 453.

118. See *Stone v. Graham*, 449 U.S. 39, 41–42 (1980); *Wallace v. Jaffree*, 472 U.S. 38, 56–60 (1985); *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307–08 (2000).

119. *Lynch*, 465 U.S. at 691.

120. 448 U.S. 297 (1980).

121. *Id.*, 448 U.S. at 319.

122. See *id.* at 319–20 (“In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.”).

pass the first prong of the endorsement test. The only way to connect the Board's actions to Hasidism is to point to the religious beliefs that may coincide with the Board's motivations. The Court's decision in *Harris* forecloses this proof as sufficient evidence of a non-secular purpose.

Further, it does not appear that the plaintiffs in *Montesa* will have any better luck in proving a violation of the primary effect prong of the endorsement test. In *Lynch*, Justice O'Connor explained this prong as asking whether "the practice under review in fact conveys a message of endorsement or disapproval."<sup>123</sup> The Court has hesitated to impart findings of religious effect without evidence of clear sectarian favoritism. In *Lynch*, Justice O'Connor was clear that if a primary effect of the government action was to advance religion, it was permissible as long as the government practice did not have the effect of government endorsement of the religion.<sup>124</sup>

The plaintiffs in *Montesa* could attempt to prove this effect by showing that the exclusive beneficiaries of the Board's actions were members of the Hasidic community. However, in *Mueller v. Allen*,<sup>125</sup> the Court made it clear that a benefit to a sectarian group is not enough to violate the Establishment Clause in and of itself.<sup>126</sup> In *Mueller*, the Court assessed the constitutionality of a tuition tax deduction that was used almost exclusively by parents who sent their children to sectarian schools.<sup>127</sup> The Court held that the constitutionality of this law was not threatened by the fact that it was implemented to benefit only sectarian schools.<sup>128</sup> The Court explained its holding by pointing to the fact that private citizens elected to take advantage of the tax benefits, and the fact that many of these citizens were religious does not affect the constitutionality of the law itself:

We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual

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123. *Lynch*, 465 U.S. at 690.

124. *Id.* at 691-92.

125. 463 U.S. 388 (1983).

126. *See id.* at 401 (rejecting constitutional attack to a facially-neutral tax statute on the grounds that it disproportionately benefitted parents of public school children).

127. *Id.* at 388.

128. *Id.* at 401.

reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.<sup>129</sup>

The same can be said of the Board's reimbursement scheme in *Montesa*. Even though it may be held to violate the IDEA and New York state law,<sup>130</sup> the violation cannot be proven as religiously motivated. Under *Muller*, the Board could argue that its reimbursement process was open to the whole district, and as such, it was not an Establishment Clause violation just because only members of the Hasidic community took advantage of it.

Without a more particularized theory of secular purpose, the Board may also have grounds for constitutionality by claiming their purpose in funding yeshiva tuitions was to provide for the special needs children of their district. The Court in *Zobrest v. Catalina Foothills School District*<sup>131</sup> upheld provisions of the IDEA that resulted in federal payment for interpreters in sectarian schools.<sup>132</sup> By relying on *Muller*, the Court found that the IDEA's purpose to meet the educational needs of disabled children satisfied the secular purpose prong of the endorsement test.<sup>133</sup>

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129. *Id.*

130. See Mareesa Nicosia, *Court: East Ramapo Broke Law on Special-Ed Placement Practice*, THE JOURNAL NEWS (Jan. 17, 2014), <http://www.lohud.com/article/20140117/NEWS02/301170079/> (reporting on a New York supreme court upholding New York Department of Education rulings that the Board violated state and federal special education law through its reimbursement scheme).

131. 509 U.S. 1 (1993).

132. *Id.* at 10.

133. *Id.* ("The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under

The limitations imposed by the endorsement test thus make it clear that the only way for the plaintiffs in *Montesa* to succeed in a First Amendment claim against the Board is with a different conceptualization of the Establishment Clause and *Lemon* requirements. As one scholar has said of the secular purpose prong: "In fact, the problems inherent in the actual purpose behind any given government action may erode the very protection proponents champion."<sup>134</sup> In the case of East Ramapo, the insufficiencies of the endorsement test have eroded the Establishment Clause's protection for the residents of the school district. Therefore, in order to offer First Amendment protections for the residents of East Ramapo, the judiciary must move outside of the constraints of the endorsement test, recognizing the value of the *Lemon* test's lost third prong: the entanglement prong.

#### *B. Reclaiming Lemon's Entanglement Prong to Address East Ramapo*

In order to protect these residents, the judiciary should reclaim the value in *Lemon*'s entanglement prong. This prong states that a statute is a violation of the Establishment Clause if it "foster[s] an excessive entanglement with religion."<sup>135</sup> While such a move may initially seem unstable, it is not unprecedented or even unwarranted by First Amendment jurisprudence.<sup>136</sup> This is because the current application of

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the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends.").

134. Dokupil, *supra* note 115, at 626.

135. *Lemon*, 403 U.S. at 613.

136. The conflict inherent in broad, flexible jurisprudence is captured by Judge Posner:

The framers of a constitution who want to make it a charter of liberties and not just a set of constitutive rules face a difficult choice. They can write specific provisions and thereby doom their work to rapid obsolescence, or they can write general provisions, thereby allowing substantial discretion to the authoritative interpreters, who in our system are the judges . . . . Many provisions of the Constitution, however, are drafted in general terms. This creates flexibility in the face of unforeseen changes, but it creates the possibility of alternative interpretations, and this possibility is an embarrassment for a theory of judicial legitimacy that denies judges have any right to exercise

the endorsement test to the facts of East Ramapo still leads to a result that is repugnant to the Establishment Clause. Motivating principles of the Establishment Clause show that entanglement is a viable factor in Establishment Clause jurisprudence.

One motivating principle in framing the Establishment Clause was to protect religion from the tainting of government.<sup>137</sup> The actions of the East Ramapo School Board show that the Establishment Clause is needed to protect minority religious beliefs from majoritarian abuse. The Court's language in *Engel v. Vitale*<sup>138</sup> best explains this role of the Establishment Clause:

The history of governmentally established religion, both in England and in this country, showed that

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discretion. A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences. Reading is not a form of deduction; understanding requires a consideration of consequences. If I say, "I'll eat my hat," one reason why my listeners will "decode" the meaning of this statement in nonliteral fashion is that I couldn't eat a hat if I tried. The broader principle, which applies to the Constitution as much as to a spoken utterance, is that if one possible interpretation of an ambiguous statement would entail absurd or terrible results, that is a good reason to reject it.

Richard Posner, *What Am I? A Potted Plant?*, in *OVERCOMING LAW* 229, 233–34 (Harvard Univ. Press 1995).

137. See *Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."); *Sch. Dist. of Abington Twp. Pa. v. Schempp*, 374 U.S. 203, 234 (1963) (Brennan, J., concurring) ("[W]hat Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each."); James Madison, *Memorial and Remonstrance* (1785), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 5, 9–10 (Marvin Meyers ed., Univ. Press of New Eng. for Brandeis Univ. Press rev. ed. 1981) ("[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.").

138. 370 U.S. 421 (1962).



whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support for government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.<sup>139</sup>

This theory is validated in the experiences of the Board members in East Ramapo. These experiences also serve as evidence that the actions of the Board have entangled the Hasidic faith with the local government to the detriment of both entities. Hasidic Board members report having to deal with religious slurs from community members, and following a November election in which the Jewish community split its vote among two opponents,<sup>140</sup> the losing opponent hinted at growing divisions within the Hasidic community. This harm to public perception and political divide within the community is a result of the Hasidic sect's entanglement with the local government in Spring Valley. This entanglement also harms the Hasidic faith. Allegations of fraud and deceit on the Board<sup>141</sup> certainly rise to the level of perverting the tenets of Hasidism that call for "devout piety, service to God and one's fellow human beings beyond the required norm."<sup>142</sup> Further, the irony of the Board's attempt at de facto separatism is that its actions have entangled

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139. *Id.* at 431-32 (citations omitted). See also *Weisman*, 505 U.S. at 589-90 ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.").

140. See Polanve, *supra* note 2.

141. See *supra* note 79 and accompanying text.

142. Morris M. Faierstein & Joel Rosenberg, *Hasidic Masters*, THE JEWISH ALMANAC 24 (Richard Siegel & Carl Rheins eds., 1980).

its community and religious leaders with the surrounding secular community it is attempting to displace, distorting its initial goal of isolating themselves.

Apart from protecting the sanctity of religion, the Establishment Clause is also meant to ensure religious freedom for all, protecting religious minorities from government persecution. In *Engel*, the Court notes: "Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand."<sup>143</sup> The Court in *Lee v. Weisman*<sup>144</sup> also recognizes this traditional lesson of the Establishment Clause, noting that: "[T]he lesson of history that was and is the inspiration for the Establishment Clause . . . [is] that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."<sup>145</sup>

One rationale for initially reducing the importance of the entanglement prong was that the political process could best prevent religious entanglement. Numerous Supreme Court Justices have commented that the modern political process will ensure religious freedom for minority groups. In *Wolman v. Walter*,<sup>146</sup> Justice Powell writes: "At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause . . . . The risk of significant religious or denominational control over our democratic processes or even of deep political division along religious lines is remote . . . ."<sup>147</sup> In *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>148</sup> Justice Scalia writes that: "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation,"<sup>149</sup>

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143. *Engel*, 370 U.S. at 432.

144. 505 U.S. 577 (1992).

145. *Id.* at 591–92.

146. 433 U.S. 229 (1977).

147. *Id.* at 263 (Powell, J., concurring).

148. 494 U.S. 872 (1990).

149. *Id.* at 890. However, it appears that Justice Scalia may not believe that the political process will protect minority religious beliefs completely. Later in his opinion, he writes:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that

suggesting that a diverse religious society will protect the religious freedoms of all involved through the political process.

The stories of East Ramapo prove these Justices wrong in that sheer diversity is not enough to guard against religious domination. It is worth noting that the non-Hasidic population outnumbers the Hasidic population in Spring Valley.<sup>150</sup> Yet, the Hasidic community's focus on voting and using political positions to advance a Hasidic agenda led to a Hasidic voter turnout consistently larger than that of the non-Hasidic population.<sup>151</sup> This presents a situation where the political process is used to facilitate rather than curtail governmental entanglement with religion.

Justice Powell, in a concurrence to *Aguilar v. Felton*,<sup>152</sup> emphasizes the importance of the Establishment Clause when political and religious divides mix with political power to exacerbate religious differences:

This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here . . . . [T]here remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government . . . . In short, aid to parochial schools of the sort at issue

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unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs. *Id.*

150. See *supra* notes 61–72 and accompanying text.

151. See *supra* notes 73–100 and accompanying text.

152. 473 U.S. 402 (1985). *Aguilar* forbade public school teachers from providing special education services in parochial schools, which led to the gap of special education services in the Kiryas Joel village. See *supra* notes 36–43 and accompanying text.

here potentially leads to “that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.”<sup>153</sup>

Justice Powell’s words eerily foreshadow the political strife of East Ramapo, as the local paper is filled with editorials calling for grassroots unity to “force politicians to respond one way or another to their dissent” as is required by “a true democracy.”<sup>154</sup> A system not responsive to the will of its people is indicative of “a political system strained to the breaking point,”<sup>155</sup> especially when this system is created by an “imbalance of political influence” based on religion.<sup>156</sup>

The failures of the political process and the growing political strife make it clear that judicial intervention is needed. The Establishment Clause offers a remedy in the case of government pollution of religion and religious oppression of minority viewpoints. This remedy is the entanglement prong.

#### V. CONCLUSION

While “Schwartz’s Rant”<sup>157</sup> at the May 2012 East Ramapo Central School District Board meeting is often remembered for his comment that non-Hasidic critics of the Board should “find [themselves] another place to live,” Schwartz ends his speech with a reference to the Book of Isaiah and a call for peace and unity:

I yearn to educate students who will aspire to bring  
about the days when the wolf shall dwell with the  
lamb, the leopard shall lie down with the [goat],  
and the calf and the lion shall be fattened together.  
Isaiah predicted that a little child would lead the

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153. *Aguilar*, 473 U.S. at 416–17 (Harlan, J., concurring) (quoting *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 694 (1970)).

154. See McWilliams, *supra* note 75.

155. *Aguilar*, 473 U.S. at 417.

156. See McWilliams, *supra* note 75.

157. See *supra* notes 2–3 and accompanying text.

world into that better place, and why can't it be one  
of our children?<sup>158</sup>

The traditions and intent of the Establishment Clause are meant to lead us all to that place—a place where religious majorities and minorities can coexist without the taint of government entanglement; a place where all school children are given a free, appropriate education regardless of their religious background; and a place where educational separatism can coexist with educational opportunities for all. Will the judiciary in *Montesa* reflect on the meaning of the Establishment Clause and take us there?

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158. See *supra* note 2.